Privy Council Appeal No. 84 *of* 1924.

Allahabad Appeal No. 28 *of* 1921.

Pancham and others - - - - - - - *Appellants*

v.

Ansar Husain and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MAY, 1926.

Present at the Hearing:

LORD BLANESBURGH.
LORD DARLING.
SIR JOHN EDGE.

[*Delivered by* LORD BLANESBURGH.]

This is a suit to enforce, by the sale of property taken as security, payment of the sum said to be due upon a mortgage. The only question which now remains for decision is whether the appellants' right to maintain the suit is barred by limitation. The Subordinate Judge of Allahabad, on grounds to which their Lordships will return, by his judgment of the 31st May, 1918, held that the right was barred: the High Court at Allahabad in its judgment on appeal on the 12th April, 1921, reached the same conclusion, but on other grounds. The plaintiffs, the mortgagees, appeal.

The defendants, successors of the original mortgagors, were not represented by counsel before their Lordships.

Although the issue now is one of limitation only, a short statement of the position as a whole will not be out of place.

The mortgage deed in suit is dated the 21st February, 1893. It purports to have been granted by one Saiyid Zawar Husain

and his mother, Musammat Sadar-un-nisa Bibi. She was a pardanashin lady. The deed is not executed by her, but by her son on her behalf. Both are long since dead. The son died in 1911, the mother in 1914. As a result all the facts in relation to the original transaction will probably now never be ascertained with accuracy. For this the appellants must be held responsible. Proceedings in relation to the mortgage were delayed by them until long after the death of the principal actors in the transaction. Nor has any explanation of their prolonged inaction been offered.

The mortgage bond is expressed to be for Rs. 4,000. The loan carries interest at a rate equivalent to 10 per cent. per annum. The time fixed for repayment is 12 years, but the mortgagors covenant to make an annual payment of Rs. 500 on account of principal and interest, while the bond further provides that unpaid interest shall be treated as principal and shall carry interest at the same rate. The property mortgaged is of two classes, pure Zemindari in certain mauzas in the Allahabad District now in possession of the respondents, and 13 items of property held in mortgage from other persons and sub-mortgaged by the mortgage in suit.

In the long interval these secured debts so sub-mortgaged have disappeared. The only property now effectively included in the appellants' mortgage is the immoveable estate above referred to.

Their suit was instituted on the 21st February, 1917, 24 years after the execution of the bond. A day later, and it would on any view have been hopelessly out of time. Whether it was then maintainable is the question at issue. The sum claimed for principal and interest as at the date of the plaint was no less than Rs. 34,000, an amount far in excess of the value of the mortgaged property.

There were in the suit other issues than that of limitation. Although these no longer survive, their nature and the difficulty, perhaps the impossibility, of solving them satisfactorily so long after the event and with the two mortgagors dead, emphasises the embarrassment caused by the inexplicable delay of the mortgagees in putting their claims to the test. Shortly stated, they were these.

First, as has already been said, the mortgage is not executed by the lady, and the son, so the defendants alleged, had no authority to execute it on her behalf: the lady was literate and did not need to have deeds executed for her. It may be doubted whether the certain truth, on this issue, will ever be known. The Trial Judge, however, in the result, repelled the plea of the defendants, and there that matter rests. A second defence to the suit was that no consideration for the mortgage had been received by the mortgagors. This defence was, in part, successful. The Trial Judge, after prolonged inquiry, held that Rs. 3,000 and no more had been advanced by the mortgagees. To this view the High Court adhered, and that finding was not before their Lordships

further questioned by the appellants. On the other hand, the plaintiffs alleged that the mortgagees had received from time to time instalments on account from the mortgagors. This allegation of theirs has been rejected, and is no longer persisted in. This particular matter, however, is referred to now, only as an introduction to the next statement. It will be more conveniently dealt with in a later portion of this judgment. So far, the result upon which their Lordships must act is that there is a mortgage of immoveable property duly executed by the predecessors in title of the defendants to secure an advance of Rs. 3,000, repayable in 12 years with interest at the rate of 10 per cent. per annum capitalized in case of non-payment. Thereunder the mortgagors are taken bound to pay Rs. 500 in every year on account of principal and interest, but no payment whatever on any account has been made since the date of the mortgage, the 21st February, 1893. Is a suit to enforce such a security commenced on the 21st February, 1917, barred by statute? That is the question.

If there were no more to be said it is on all hands agreed that great as is the delay the answer must be in the negative. The suit is one to enforce payment of money charged upon immoveable property to which Section 132 of the Limitation Act applies. The period of limitation fixed by that section is 12 years from the date when the money sued for became due. The date by the deed fixed for payment of principal and capitalized interest was the 21st February, 1905, and the plaint in the suit is filed within 12 years of that date, viz., the 21st February, 1917.

But the mortgage bond contains a further clause to which no reference has so far been made. The clause is as follows:—

> "Moreover, be it known that if the hypothecated property is advertised for sale or formed out in execution of the decree of any other decree holder, or on account of the arrears of the Government revenue, or if any one else acquires any right to the hypothecated property, or if there is any breach of faith, or any default in payment of rupees five hundred per annum, as aforesaid, on the part of us, the executants, or if there appears to the aforesaid creditor, any weak or strong apprehension of the loss of the principal or of the hypothecated property, then in all or any particular circumstances, the aforesaid creditor has power, without waiting for the expiry of the stipulated period, and by cancelment of the stipulations embodied in this document, to institute a suit in Court, to obtain a decree, and to realize the entire principal together with interest and costs, from our person and from our hypothecated property specified at the foot."

This was the clause by reference to which the High Court, taking cognisance only of the fact that the mortgagors had made default in payment to the mortgagees on the 17th February, 1894, of the stipulated sum of Rs. 500, decided the issue of limitation in favour of the respondents. Applying certain previous decisions of that Court, and in particular a Full Bench decision in *Gaya Din* v. *Jhumman Lal*, 37 All. 400, the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other

form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage "become due," so that all right of action in respect of the security is finally barred 12 years later, that is, in the present case, on the 21st February, 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors, and notwithstanding that the proviso is exclusively for the benefit of the mortgagees. The decision also apparently proceeds upon the view that the words of the English Limitation Act and the English decisions thereon apply without question to the words of Section 132 of the Indian Act—a conclusion which, as it seems to their Lordships, may involve, and, on the critical point when applied to such a proviso as the present, a large assumption.

Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasised and perhaps extended as it has been by a later Full Bench decision to the same effect. See *Shib Dayal* v. *Meharban*, 45 All. 27. Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, so soon as may be, this Board should finally pronounce not only upon the question whether the principle of the two decisions in 37 All. and 45 All. is correct, but also upon the further question whether, even if it is, these decisions have any application to a proviso framed as is that now in suit. Their Lordships would be reluctant, however, to pronounce on either question in the absence of full argument, and it is accordingly a satisfaction to them to find that the present case, in which they have had no assistance from the respondents, can, as they think, regardless of the general question, be decided on its own special circumstances which, apparently, the High Court was not concerned to note.

The position is this. Whatever else in relation to such provisos as the present may be open to debate, one thing is clear, viz., that such a default on the part of the mortgagors as was here relied on by the High Court gave to the mortgagees a right by appropriate action to make the mortgage moneys immediately due, and the special circumstance in this suit is, that, from the date of their amended plaint in it, the appellants' case necessarily imported that the mortgagees had—if it was necessary for them so to do—brought about that state of things, and that the appellants' right to a decree was to be judged of on that basis. A short reference to the plaint and amended plaint will make this clear.

In fulfilment of the obligation in that behalf imposed on plaintiffs by Order 7 r. 1 (*e*) of the Code, para. 7 of the plaint alleged as follows :—

"The cause of action for this suit accrued *on the* 21*st February*, 1905, ... within the local limits of the jurisdiction of this Court. The case is cognisable by this Court."

The plaint presented in this form on the 21st February, 1917, was, in pursuance of Order 7 r. 11 (*d*) of the Code, on the 23rd February, 1917, rejected with this note :—

"Under the terms of the mortgage deed, the cause of action for this suit accrued to the plaintiffs on the 21st February, 1894, when the first instalment was not paid. The suit is beyond time with reference to the said date. The plaintiffs have not shown in the plaint why the suit is not time-barred.

The reference there, of course, is to Order 7 r. 6 of the Code.

In consequence of this deliverance the plaintiffs under order amended paragraph 7 of their plaint, and it was on that paragraph as so amended that they went to trial.

The amended paragraph runs as follows :—

"The cause of action for this suit accrued *on the* 21*st February*, 1894, ... within the local jurisdiction of this Court, as also on other different dates, namely, the 15th of December, 1899, the 9th of January, 1901, the 15th of February, 1902, the 15th of January, 1903, the 16th of January, 1904, and the 10th of April, 1906, when the interest was paid. The case is cognisable by this Court."

In their Lordships' judgment the meaning of this amended allegation is not to be mistaken. First of all the plaintiffs thereunder definitely abandon the contention on which their whole appeal now rests, viz., that their cause of action did not accrue until the 21st February, 1905. Secondly, the plaintiffs' assertion that the cause of action accrued to them on the 21st February, 1894, an allegation be it remembered which is not traversed in any written statement, involves the assertion that all conditions on their part were fulfilled if any had to be fulfilled, and that all things were done if any had to be done to bring about that result as well as an assertion that the result was attained. Further, the allegation now is that the suit, which would otherwise have been out of time, is exempted from limitation only by the payments of interest specified. That henceforth was the plaintiffs' only case, and it would have succeeded if these payments had been proved. But the plaintiffs' attempt to prove them, as has been stated, entirely failed, and no suggestion that any such payment had been made or received was even presented to the Board by the appellants' counsel. Having made a finding of fact in the same sense, the Trial Judge, by his judgment of the 31st May, 1918, dismissed the suit with costs. That was, their Lordships think, his proper course. No other issue was or is, on the pleadings, open to the plaintiffs, and their conduct in this matter is not such as to entitle them to claim any more than strict treatment. On their own chosen issue they fought : to that issue they directed evidence which was not believed : on it, therefore, they failed. And by that failure they must abide. Their appeal to the High Court should have been dismissed, as their Lordships

think, on the same ground. The contention which that Court combated by its deliverance already referred to was not on their pleadings open to the appellants, who, for the same reason, cannot on their appeal to this Board be heard to say, as they must say, if the appeal is to succeed, that their cause of action did not accrue to them until the 21st February, 1905, an allegation which, originally made, was, as has been seen, deliberately abandoned in their amended plaint.

Their Lordships accordingly, without pronouncing in any way upon matters which must one day call for most serious consideration at the hands of the Board, think that this appeal should be dismissed on the short ground that the appellants are committed to the position that their cause of action accrued to them on the 21st February, 1894, and that their suit, in the absence of any payment or acknowledgment by the mortgagors, was barred long before the date on which it was instituted, in point of fact it was barred on the 21st February, 1906.

On that ground their Lordships will humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council.

PANCHAM AND OTHERS

v.

ANSAR HUSAIN AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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